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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CASCADE NATURAL GAS CORPORATION, *Appellant*, v. EL PASO NATURAL GAS COMPANY, *et al.*, *Appellees.*	No. 4

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

BRIEF OF APPELLANT

I.

OPINIONS BELOW

On January 22, 1965, the District Court signed and entered a stereotyped order presented by appellee *El Paso* in *United States of America v. El Paso Natural Gas Company*, Civil No. 143-57, denying appellant Cascade's application for leave to intervene. (R. 1125-1126) The court adopted appellee El Paso's brief as its opinion in support of the order. (R. 1133-1148) 1965 CCH Trade Cases, Para. 71, 362; 37 F.R.D. 330.

On June 24, 1965, the District Court signed and entered a Decree of Divestiture pursuant to a stipulation between El Paso and the Department of Justice. 1965 CCH Trade Cases, Para. 71, 453. (R. 2024-2025; R. 2172-2179)

II.

JURISDICTION

Cascade sought to intervene in the diverstiture proceedings in the District Court on remand following the decision of this court in *United States v. El Paso Natural Gas Company*, 376 U.S. 651, 12 L.Ed.2d 12, 84 S. Ct. 1044 (1964). Cascade based its application on Rule 24(a)(2) of the Federal Rules of Civil Procedure asserting that it would be bound by the judgment of the District Court and that the representation of its interest by existing parties would be inadequate. (R. 345-352) Cascade also relied on Rule 24(a)(3) asserting that it was so situated that it would be adversely affected by the District Court's disposition of the properties in its custody in the manner proposed by El Paso. (R. 352-354)

Jurisdiction of the Supreme Court to review by direct appeal the order of the District Court denying Cascade's Application for Leave to Intervene is conferred by the Expediting Act, 15 U.S. Code, Sec. 29; 32 Stat. 823 (1903); amended 36 Stat. 1167 (1911), 58 Stat. 272 (1944), 62 Stat. 989 (1948) and is sustained by the following decisions:

United States v. Loew's, Inc., 371 U.S. 38, 9 L.Ed.2d 11, 83 S. Ct. 97 (1962);

Sam Fox Publishing Co. v. United States, 366 U.S. 683, 6 L.Ed.2d 604, 81 S. Ct. 1309 (1961);

United States v. Du Pont De Nemours & Co., 366 U.S. 316, 6 L.Ed.2d 318, 81 S. Ct. 1243 (1961);

Sutphen Estates Inc. v. United States, 342 U.S. 19, 96 L.Ed, 19, 72 S.Ct. 14 (1951), *reh den.* 342 U.S. 907, 96 L.Ed. 679, 72 S. Ct. 289 (1952);

Brotherhood of Railroad Trainmen v. Baltimore & O.R.R., 331 U.S. 519, 91 L.Ed. 1646, 67 S. Ct. 1387 (1947);

Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137, 88 L.Ed. 1188, 64 S. Ct. 905 (1944); *reh den.* 322 U.S. 771, 88 L.Ed. 1596, 64 S. Ct. 1257 (1944);

Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, 85 L.Ed. 975, 61 S. Ct. 666 (1941);

Continental Insurance Co. v. United States, 259 U.S. 156, 66 L.Ed. 871, 42 S. Ct. 540 (1922);

Credits Commutation Co. v. United States, 177 U.S. 311, 44 L.Ed. 782, 20 S. Ct. 636 (1900).

Subsequent to the entry of the divestiture decree by the District Court, Cascade supplemented its Jurisdictional Statement to assert that the decree did not conform to the mandate of this court. Therefore, this appeal also invokes the inherent power and jurisdiction of the Supreme Court to review the Decree of Divestiture entered by the District Court to ascertain whether such decree complies with its mandate. This power is declared in the following cases:

Continental Insurance Co. v. United States, 259 U.S. 156, 66 L.Ed. 871, 42 S. Ct. 540 (1922);

United States v. Du Pont De Nemours & Co., 366 U.S. 316, 6 L.Ed.2d 318, 81 S. Ct. 1243 (1961).

On January 17, 1965, this court issued its order noting probable jurisdiction of this appeal and the related appeals designated Nos. 5 and 24, October Term 1966, and consolidating them for hearing. (R. 2207)

III.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Does the divestiture decree and order entered June 24, 1965, by the United States District Court, District of Utah, Central Division, comply with the mandate of the Supreme Court in *United States v. El Paso Natural Gas Company*, 376 U.S. 651, 12 L.Ed.2d 12, 84 S. Ct. 1044 (1964)?

2. Where this court reversed the District Court and ordered divestiture and Cascade applied for leave to intervene promptly upon receiving notice of El Paso's proposed decree of divestiture:

(a) Does Cascade, a public utility selling natural gas in Washington and Oregon supplied solely pursuant to contract with El Paso, have a right under Rule 24 (a)(2) of the Federal Rules of Civil Procedure (or the 1966 Amendment thereto) to intervene in this case, (i) where the decree of divestiture will impose upon it a new sole supplier of gas, and (ii) where Cascade has shown by uncontroverted affidavits that under the form of decree urged upon the District Court by El Paso (and adopted by the District Court subsequent to this appeal), said new sole supplier will be so constituted as to be substantially less capable of supplying Cascade's long-term gas requirements than El Paso and its predecessors have been?

(b) Does Cascade have a right under Rule 24(a)(3) of the Federal Rules of Civil Procedure (or the 1966 Amendment thereto) to intervene in this case (i) where the applicable law, the record and Cascade's uncontroverted affidavits show that no present party is a customer of El Paso, as is Cascade; (ii) where no present party to the action will be obliged to be a customer of the new entity to be created by the decree of divestiture and Cascade will

be; (iii) where the Department of Justice is not familiar with and is under no duty to protect Cascade's private interests (and subsequent to this appeal has adopted a position adverse thereto); (iv) where the objectives of El Paso in the proceedings are adverse to Cascade's interests and (v) where Cascade has no remedy in any other forum?

IV.

STATEMENT OF THE CASE

In November, 1956, the Board of Directors of the Pacific Northwest Pipeline Corporation ("Pacific") approved an exchange of shares with the El Paso Natural Gas Company ("El Paso"). By May 1957, El Paso had acquired 99.8% of Pacific's outstanding stock and had taken control of Pacific. In July, 1957, the Department of Justice filed an action in the Federal District Court for the State of Utah, Central Division, charging that this acquisition violated Section 7 of the Clayton Act, 15 U.S. Code Sec. 18, 38 Stat. 731 (1914); amended 64 Stat. 1125 (1950).

In August 1957, El Paso applied to the Federal Power Commission ("the Commission") for permission under Section 7 of the Natural Gas Act, 15 U.S. Code Sec. 717f(c), 52 Stat. 825 (1938); amended 56 Stat. 83 (1942), 61 Stat. 459 (1947); to acquire and operate the jurisdictional properties of Pacific by merger. On December 23, 1959, the Commission approved such acquisition. *In re Pacific Northwest Pipeline Corporation,* (Dkt. No. G-13019), 22 FPC 1091, 31 PUR.3d 456 (1959), *reh. den.* 23 FPC. 350 (1960). The merger was effected on December 31, 1959. Hereafter, the industrial-financial aggregation formed by the merger of El Paso and Pacific will be referred to as El Paso-Pacific to differentiate it from pre-merger El Paso and El Paso after divestiture. In 1962, this court reversed the Circuit Court of Appeals which

had affirmed the Commission's order, holding that the Commission should not have acted until the District Court had passed on the Clayton Act issues. *California v. Federal Power Commission*, 369 U.S. 482, 8 L.Ed.2d 54, 82 S. Ct. 901 (1962).

During the pendency of the Commission proceedings, the United States amended its complaint to include the asset acquisition in the charged violation of the Clayton Act. After a trial, the District Court held that the stock acquisition and the property acquisition by El Paso did not violate the Clayton Act. This decision was reversed by this court on a direct appeal by the United States, *United States v. El Paso Natural Gas Company*, 376 U.S. 651, 662, 12 L.Ed.2d 12, 84 S. Ct. 1044 (1964). This court held that "the effect of such acquisition may be substially to lessen competition within the meaning of Section 7 of the Clayton Act" and

> "Since appellees have been on notice of the antitrust charge from almost the beginning—indeed before El Paso sought Commission approval of the merger—we not only reverse the judgment below but direct the District Court to order divestiture without delay."

The foregoing decision was rendered on April 6, 1964. On July 8, 1964, the Department of Justice advised the District Court that the Government was placing the burden on El Paso-Pacific to present a divestiture plan. (R. 43) On October 7, 1964, Cascade, having become concerned about the impact of the divestiture upon its operations, filed an Application for Leave to Intervene. (R. 69-74) A plan of divestiture was offered by El Paso-Pacific at a hearing held October 19, 1964 (R. 137 *et seq.*; Def. Ex. A; R. 1835-1875), and testimony was present-

ed with respect to the details of such proposal. The Department of Justice requested a continuance for the purpose of evaluating the plan and hearings were resumed on December 2, 1964. At such hearing and consistently thereafter, the Department of Justice vigorously opposed the El Paso-Pacific plan (R. 742-750, 1049-1076), contending that the El Paso-Pacific plan was deficient in the following respects: (R. 1052-1053)

1. The plan, providing for a "spin-off" of shares in a new company to El Paso's own shareholders, would not establish the new company as a corporation completely independent of El Paso.

2. The plan, in failing to allocate to the new company a fair share of the San Juan Basin gas reserves acquired by El Paso-Pacific after the stock acquisition and merger, would deprive the new company of its fair share of gas needed to compete for additional markets.

3. The plan provided unilateral changes in some of the most important provisions of certain contracts to which Pacific had been a party prior to the merger and which would be transferred to the new company, which changes would be detrimental to the new company.

4. The plan provided for retention by El Paso of the proceeds of selling to third persons 1,157,125 shares of common stock in Westcoast Transmission Company, Ltd., valued at approximately $17,000,000, which stock El Paso-Pacific had acquired from Pacific.

5. The plan failed to provide the new company with any benefit from over $53,000,000 in tax loss carry-overs of Pacific existing at the time of the merger and which El Paso-Pacific had acquired and used.

At the hearing held on October 19, 1964, the District Court ordered would-be intervenors to file their memoranda and evidence in support of their applications for intervention by November 19, 1964, and set December 2, 1964 for hearing the applications. (R. 204)

Obeying the District Court's order, Cascade on November 19, 1964, duly filed its Memorandum of Evidence, Law and Argument In Support of Its Application for Leave to Intervene. (R. 342-443) Although other would-be intervenors also submitted memoranda, Cascade was the only intervenor to submit proposed evidence in the form of affidavits and an engineering study of the El Paso-Pacific divestiture plan showing that the plan would adversely affect Cascade if it were approved. At the December 2 hearing, counsel for Cascade pointed out that the affidavits supporting Cascade's application stood uncontroverted by either El Paso-Pacific or the Department of Justice and therefore the right to intervene must be deemed to have been admitted by those parties. (R. 566, 567) On December 8, 1964, the District Court Judge orally denied en masse the applications of all the would-be intervenors including Cascade and indicated that a memorandum and order would be forthcoming. (R. 795, 796) On January 22, 1965, the court entered a written order denying Cascade's Application for Leave to Intervene. Notwithstanding Cascade's submission of uncontroverted affidavits, including an engineering study, the court in this order said:

> "No evidence in the form of witnesses or documents in support of the interest of said applicant in the above entitled matter was ever offered by said applicant;" (R. 1126)

The District Court Judge signed orders in identical form with only the name of the intervenor changed, denying the applications of all the intervenors, and instead of writing his own memorandum as promised, adopted verbatim as his opinion the brief of El Paso-Pacific filed in opposition to the applications. (R. 1133-1148) Cascade filed Notice of Appeal in the District Court on February 19, 1965. (R. 1398-1400)

On January 6, 1965, the Department of Justice filed a brief opposing El Paso-Pacific's plan of divestiture, and referred to an alternative plan. (R. 1049-1076) The hearings on the proposed plan were concluded in early February, 1965, and on February 19, 1965, the Department of Justice filed proposed Findings of Fact and Conclusions of Law and its "Brief after Divestiture Hearings" by which it continued its opposition to the plan. (R. 1401-1414, R. 1415-1433.

On May 24, 1965, a stipulation between the Department of Justice and El Paso-Pacific for entry of an agreed decree of divestiture, differing from El Paso-Pacific's plan only as to the proposed manner of distribution of stock of the recipient of the divested assets, was filed in the District Court. (R. 2025) This was the first indication of record that the Department of Justice had abandoned its opposition to the plan. While the stipulation purported to afford each affected person the right to appear before the District Court as *amicus curiae* (without right of appeal), the District Court Judge made no order to this effect with respect to Cascade (apparently, he did sign orders supplied to him by counsel for El Paso-Pacific with respect to three former applicants for intervention). (R. 2029-

2035) At a hearing held on June 24, 1965, Southern California Edison Company, the State of Oregon and the State of Washington again objected to several features of the proposed divestiture decree. (R. 2040-2077) Their objections were to no avail and the decree was entered without change by the District Court. (R. 2185) The decree adopted, without change, that part of the El Paso-Pacific proposed plan pertaining to the division of El Paso-Pacific assets between a new company to be called Northwest Pipeline Corporation ("Northwest") and El Paso, which Cascade challenged in its application to intervene. On January 17, 1966, this court noted probable jurisdiction of Cascade's appeal. (R. 2207)

V.

SUMMARY OF ARGUMENT

Cascade, as a would-be intervenor and as one properly before this court through this court's noting of probable jurisdiction, invites this court's attention to the inadequacy of the divestiture decree entered by the District Court. That decree fails to comply with the mandate of this court to eliminate the illegal combination between El Paso and Pacific and the concomitant tendency to restrain competition because, among other things, it fails to deprive the defendant El Paso of immense benefits it has derived from violating the Clayton Act. The defendant retains huge reserves of low-cost dry gas strategically situated with respect to its California markets. This is a kind of gas in which it was seriously deficient before it acquired Pacific and eliminated its competition for dry gas in the Southwestern United States. The defendant El Paso retains the golden California gas market free of the threat of Northwest's competition because the

decree effectively eliminates Northwest's ability to become a factor in the California market whether or not it may become infused with the will to compete there.

Cascade proposes modifications of the decree to be made by this court before remanding the case for further proceedings in the District Court. The most important of these modifications would allocate enough of the domestic dry gas reserves of El Paso-Pacific to Northwest so that it would hold the same relative amount which Pacific held vis-a-vis El Paso when it was illegally acquired in 1957. This enhancement of Northwest's reserves will give Northwest a relative ability to compete with El Paso in California commensurate with that enjoyed by Pacific nine years ago.

Cascade, as an applicant for intervention, has made a sufficient showing of how its substantial and well-defined private interests as a captive customer of El Paso-Pacific are directly jeopardized in these proceedings and has shown its need to be permitted to defend those interests. It has thereby established its right to intervene under both the former and current versions of Rule 24(a) of the Federal Rules of Civil Procedure and should be given leave to intervene for the purpose of further or new proceedings in the District Court.

VI.

ARGUMENT

A. Introduction

Cascade pressed its application to intervene in the District Court proceedings because it was convinced that the El Paso-Pacific plan would result in the creation of a new

company so weak in reserves and financing as to adversely affect Cascade's ability to serve its markets, to compete with other forms of fuel and to enter new markets. (R. 357-361) It was prompted by a concern that the Department of Justice lacked the technical resources and the duty adequately to represent its private interests and did not fully understand those interests. (R. 348-349) It has been dismayed to see its worst fears confirmed and to see the Department of Justice completely abdicate its previously recognized responsibility to the public and to this court to contend for a proper divestiture decree. See *United States v. American Tobacco Co.*, 221 U.S. 106, 55 L.Ed. 663, 31 S. Ct. 632 (1911). In this court, the Department of Justice has since acknowledged Cascade's special, "protectable" interest as a customer with a legal right under public utility principles to adequate service. Government's Motion to Dismiss or Affirm filed August 29, 1966, *Pioneer National Title Insurance Company v. United States*, (U.S. Sup. Ct., O.T., 1966 No. 402.)[1] Cascade

1. The Solicitor General and the Justice Department in their Motion to Dismiss or Affirm filed August 29, 1966, in this Court in *Pioneer National Title Insurance Company v. United States* (Oct. Term 1966, No. 402), stated:

> "In every anti-trust case there are myriad persons and firms who may be affected in some manner by the decree but who, like Pioneer, have no legally protected interest. Pioneer's claim is that it is entitled, with Chicago Title, to a duopoly of the Cook County title-insurance industry, free from effective competition from the St. Louis Company. A claim so opposed to the objectives of the anti-trust suit, by one whose interest in the suit is so remote from conventional notions of a legally *protectable* interest, does not support intervention. Summary disposition is therefore warranted.
>
> "We consider this case quite different from the pending intervention cases growing out of the El Paso-Pacific Northwest divestiture. *Cascade Natural Gas Co. v. El Paso Natural Gas Co.*, Nos. 4, 5, 24 O. T. 1966. * * * *Cascade (appellant in No. 4) also has a special interest as a customer with a legal right under public utility principles to adequate service* . . . " (Emphasis supplied)

here asserts its private right to suffer "no more than its fair share of whatever losses may result from the enforcement of the anti-trust laws. Black, J. dissenting in *Sutphen Estates, Inc. v. United States*, 342 U.S. 19, 96 L.Ed. 19, 72 S. Ct. 14 (1951). This right will be protected only if this court directs a proper division of the assets of El Paso-Pacific between El Paso and Northwest as required by the Clayton Act and the mandate of this court.

B. The District Court's Decree Fails to Separate El Paso From Important Fruits of Its Violation of the Clayton Act and Fails to Restore the Competitive *Status Quo Ante*

In *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 92 L.Ed. 1245, 68 S. Ct. 947 (1948), this court said that the starting point for determining to what extent divestiture should be ordered is to inquire what the dividends of the illegal combination were, because these must be divested as a minimum requirement of effective relief. Here, as in that case, the District Court did not address itself to the problem, and there are no findings as to what these dividends of the illegal combination were. Instead, El Paso-Pacific was asked to prepare its own plan with no guidelines from the Department of Justice or the District Court as to what assets would have to be divested. Not surprisingly, El Paso-Pacific took advantage of this opportunity to pick and choose the assets to be allocated to El Paso and to Northwest. The resulting El Paso-Pacific plan is based principally on the self-interest of El Paso and the minimum requirements for obtaining regulatory approval for Northwest. (R. 144, 693-695, 959)

Counsel for El Paso-Pacific argued to the District

Court that the principles of the *Schine Theatres* case were not applicable because no past illegal conduct on El Paso's part was involved and hence there were no fruits of such conduct to divest. (R. 956) It may be that where no monopoly is accomplished and only a tendency to monopoly is found, there is no need for that degree of divestiture designed to render monopoly power impotent. But there can be fruits of an illegal combination which tends to restrain competition, even if it does not achieve monopoly. Surely these fruits must be divested to undo and to discourage such combinations. The illegal conduct herein commenced with the stock acquisition in May, 1957, and continues to this day. While specific findings are lacking, we can deduce from the record the enormous rewards which El Paso-Pacific has derived from its violation of the Clayton Act and which El Paso will retain if the decree is not modified. El Paso's management will be able to list the following net benefits of acquiring Pacific, notwithstanding these proceedings:

1. El Paso has not had to compete with Pacific in California since 1957 and probably won't have to compete there with Northwest in the foreseeable future because Northwest is "strait-jacketed" to serve only its Pacific Northwest markets.

2. Elimination of Pacific has made it possible for El Paso to acquire huge new reserves of low-cost dry gas in the Southwest United States without having to compete with Pacific for them.

3. For nine years El Paso has been able to use former Pacific reserves in serving El Paso-Pacific customers and, as a consequence, has been able to conserve those gas

sources which it would otherwise have had to consume and which it will retain after divestiture.

4. Pacific's stock interest in Westcoast Transmission Ltd. has been eliminated and placed with persons selected by El Paso. El Paso has retained the value and deprived Northwest of the competitive advantages this valuable asset conferred on Pacific.

5. Management friendly to El Paso and, unlike the former Pacific management, not presently inclined to cause Northwest to compete with El Paso, has been placed in control of Northwest.

6. Modifications favorable to El Paso have been obtained to the Kingsgate agreement and the San Juan Gathering agreement without the necessity of obtaining the agreement of an independent management of Northwest.

Unless this court supplies a remedy, El Paso's management will be able to report that although the Government won the anti-trust battle in the Supreme Court, El Paso won the war on remand to the District Court. *United States v. Du Pont De Nemours & Co.*, 366 U.S. 316, 6 L.Ed.2d 318, 81 S. Ct. 1243 (1961).

C. The District Court's Decree Will Tend to Perpetuate El Paso's Suppression of Competition in California

This court, in its previous decision in this case, described the competitor and competitive situation faced by El Paso before it acquired Pacific in 1957:

> "Pacific Northwest had proximity to the California market—550 miles distant in Wyoming, even nearer in Idaho, only 250 miles away in Oregon. More

> over, it had enormous reserves in the San Juan Basin, the Rocky Mountains, and Western Canada. Had Pacific Northwest remained independent, there can be no doubt it would have sought to exploit its formidable geographical position vis-a-vis California."

and

> "Pacific Northwest was no feeble, failing company; nor was it inexperienced and lacking in resourcefulness. * * * It had adequate reserves and managerial skill. It was so strong and militant that it was viewed with concern, and coveted, by El Paso."

United States v. El Paso Natural Gas Company, 376 U.S. 651, 661; 12 L.Ed.2d 12, 84 S. Ct. 1044 (1964).

A proper divestiture decree should, as far as possible deprive El Paso of the fruits of illegally acquiring Pacific by putting El Paso back in the same competitive position vis-a-vis Northwest. Otherwise, El Paso will have benefited handsomely from its suppression of competition.

As the Government contended, Northwest has been "strait-jacketed" to serve the present Northwest market and as a potential competitor of El Paso in California is much weaker than Pacific was at the time of its acquisition. (R. 1355) This has been done by stocking Northwest with high-cost gas reserves deficient in quantity and geographically remote from California and by establishing Northwest with too little working capital ($250) and too much debt relative to its total capitalization.

Deliverability life of gas reserves is a standard used by the Federal Power Commission in judging the adequacy of those reserves to support new projects. Deliverability of gas reserves represents the capability of wells to produce. Deliverability life is the number of years the

wells are capable of meeting future estimated annual requirements for firm service. (R. 151, 152) In order to receive certification for a new project in California, Northwest would have to show that after taking into account its new service it would have approximately a twelve-year deliverability life on its gas reserves to meet anticipated annual requirements over that period. (R. 679-680) If Northwest merely tried to deliver an increment of 250,000 Mcf of gas per day to California, the deliverability life of all of its reserves would be around two or three years. (R. 751; 1283-1285) Therefore, Northwest is being established with a reserve position precluding regulatory approval of such a new project to California. Contrast this with the situation prior to the stock acquisition when Pacific had large low-cost reserves in the San Juan Basin, reserves constituting part of the formidable geographical position vis-a-vis California which, as this court observed, Pacific undoubtedly would have sought to exploit.

El Paso-Pacific's counsel bluntly told the court that Northwest would not be competing with El Paso for a project to California immediately after the court divests assets to Northwest. (R. 845) He justified this position by asserting, in direct contradiction of this court's decision, that there was in fact no competition between Pacific and El Paso at the time of the acquisition! (R. 854) The Government contended throughout the hearings that so far as its ability to compete for the California market was concerned, Northwest would be a weak company, weaker than Pacific. (R. 971) The District Court Judge evidently saw nothing wrong with all this. His conception of how the divestiture should be arranged did not envisage com-

petition between the two companies, but rather a division of the market.

> THE COURT: You see, what this plan proposes is a division of the country, a division of the market, a division of the reserves, one area to New Company and another area to El Paso. That's what the root of this plan is.
>
> "Now, if you are going to get New Company down here in competition in Southern California from the San Juan Basin, you'd upset the whole scheme . . ." (R. 976)

The Department of Justice, although maintaining throughout the hearings the necessity for restoration of the competitive factor that Pacific was before the merger (R. 976-980, 1231, 1370-1372), *United States v. El Paso Natural Gas Company*, 376 U.S. 651, 12 L.Ed.2d 12, 84 S. Ct. 1044 (1964), surprisingly adopted the court's incredible view of Clayton Act relief by its stipulation for entry of the divestiture decree.

Northwest's capital structure will also tend to hamper any efforts it might make to expand in competition with El Paso. The Department of Justice was critical of this from the outset. (R. 1071, 1718, 1719) Northwest's debt-to-equity ratio will compare unfavorably with most other, similar, companies, including El Paso. (Pl. Ex. 21, R. 1827) Northwest will have but $250 cash in the bank on the day it opens and will have to borrow an additional $5,000,000 immediately to obtain working capital. (R. 584, 585) El Paso-Pacific unilaterally determined the capitalization and the debt-to-equity ratio of Northwest, based principally upon considerations of what it could get the Federal Power Commission to approve. (R. 693-695) Any contention by El Paso-Pacific that Northwest

is stronger financially than was Pacific when it was acquired ignores the financial strength that Pacific derived from its tremendous potential. As this court observed and documented in its opinion, Pacific was no feeble, failing company. *United States v. El Paso Natural Gas Company*, 376 U.S. 651, 661-662, 12 L.Ed.2d 12, 84 S. Ct. 1044 (1964). The Department of Justice Memorandum Summarizing the Condition of Pacific Northwest at the time of its merger with El Paso filed February 3, 1965, details Pacific's financial strength. (R. 1370-1387, 1381)

D. The District Court's Decree Approves an El Paso Grab of Low-Cost, Strategically Located, Domestic Dry Gas Reserves

Mr. Boyd, El Paso-Pacific's president, admitted on cross-examination, that the El Paso-Pacific plan contemplates only the surrender of the leaseholds and contracts owned by Pacific in the San Juan Basin at the time of its acquisition and not the establishment of Northwest with the same quantity or relative amount of San Juan gas that Pacific had in reserve when it was acquired. (R. 668, 669) The plan contemplates transferring to Northwest the gas in the ground, whatever it may be, represented by former Pacific leases and contracts and not a stated volume of gas. (R. 721) El Paso-Pacific's counsel stated:

> "We propose to give them in our plan the reserves that we acquired from them in San Juan, if your Honor please, and no more, whether that be 17% or more or less. * * * We do not propose to give them any reserves in San Juan subsequently acquired with the funds of El Paso." (R. 952)

The meanings of the terms "dry gas" and "residue gas"

are important to an understanding of this case. Dry gas comes from wells which produce gas only, in fields such as the San Juan Basin, the Permian Basin and the Texas Panhandle. Casinghead gas is derived from oil wells as a by-product of the production of oil. It is taken to gasoline extraction plants where the liquified hydrocarbons are extracted. Some of it is used to operate facilities. The rest, which is spoken of as residue gas, is available for sale. The rate of production of residue gas varies with the fluctuating market demand for oil. This is not true of dry gas and it is desirable therefore, for a company like El Paso-Pacific to have enough dry gas to offset shortages of residue gas which may develop as oil production fluctuates. (Defs. Ex. G, R. 1887-1904, 1896, 1897) By "domestic gas" we mean gas produced in the United States as opposed to Canadian gas.

In 1957, Pacific had a strategic position in the San Juan Basin. It had control of a large amount of low-cost reserves. Although El Paso-Pacific's counsel has contended that Pacific was "eating gas" in 1957 (R. 988), the fact is that these reserves would have supported tremendous expansion and would have made Pacific more and more dangerous to El Paso as time went on. In contrast, El Paso, prior to 1957, was heavily dependent on fluctuating supplies of residue gas from the production of oil wells. (Defs. Ex. G, R. 1887-1904, 1889) It had such small amounts of firm supply available that the Federal Power Commission had, in the words of El Paso Pacific's counsel, repeatedly told El Paso, "You do not have adequate reserves." (R. 959) *In re Pacific Northwest Pipeline Corporation*, Dkt. No. G-13019, 22 FPC 1091, 31 PUR 3d 456, 462 (1959), *reh. den.* 23 FPC 350 (1960). The financial

community also recognized this problem by requiring relatively short maturities on El Paso debt because of the short deliverability life of the company's reserves caused by this dependence on residue gas. *Ibid*, 462.

In the exchange offering prospectus dated January 8, 1957, by which El Paso sought to induce the shareholders of Pacific to exchange their shares for El Paso shares (Defs. Ex. C, R. 1887-1904), the independent engineers and geologists, Brokaw, Dixon & McKee, estimated El Paso's dry gas reserves as follows: (R. 1900)

	Permian	
Lea County dry gas	2,167	
Panhandle dry gas	3,656[2]	
EPNG Panhandle Leasehold	526	
Miscellaneous dry gas	195	
Permian Total		6,544
	San Juan	
Mesa Verde	4,537	
Pictured Cliffs	2,763	
Paradox	128	
Fruitland	148	
Dakota	169	
Tocito	22	
San Juan Total		7,767
El Paso Total		14,311 billion cubic feet

2. Others had contracts for some of this gas.

They estimated Pacific's domestic reserves as follows:[3]

	San Juan	
Developed	1,037	
Undeveloped	2,812	
San Juan Total		3,849
	Other Domestic	
Developed	301	
Undeveloped	746	
Other Domestic Total		1,047
		4,896 billion cubic feet

Their estimate of Pacific's reserves omitted any gas in the Dakota formation which Pacific was developing (R. 619) and which subsequently proved to contain tremendous reserves. (Defs. Ex. G, Appendix A) They noted Pacific also had at least 2,200 billion cubic feet of Canadian gas under contract. Stated in terms of percentages, the pre-merger situation was as follows:

San Juan 1957

	M^2cf	
El Paso	7,767 =	66.9%
Pacific	3,849 =	33.1
	11,616 =	100.0%

All Domestic 1957

El Paso	14,311 =	74.5%
Pacific	4,896 =	25.5
	19,207 =	100.0%

In its brief opposing El Paso-Pacific's plan, filed January 6, 1965 (R. 1049-1076), the Justice Department calculated that by December 31, 1959, the date of the asset

3. The section of the prospectus entitled "Pacific's Gas Supply" containing this information does not appear in the printed record but has been printed as Appendix A to this brief.

merger and after two and one-half years of El Paso control of Pacific, the San Juan Basin percentages were (R. 1061, 1062):

	M²cf	
El Paso	7,769[4]	= 74.42%
Pacific	2,670	= 25.58%
	10,439	= 100.00%

The Department of Justice further calculated that under the El Paso-Pacific divestiture plan, Northwest would come out of the El Paso-Pacific combination with an even smaller percentage of the San Juan reserves (R. 1062):

	M²cf	
El Paso	12,242	= 82.94%
Northwest	2,518	= 17.06%
	14,760	= 100.00%

Northwest's percentage probably declines every day divestiture is delayed.

By Contrast, El Paso-Pacific in its 1962 Annual Report (Pls. Ex. 5, R. 1720, p. 14) estimated its domestic reserves at 35,600 billion cubic feet, almost double the combined domestic reserves of Pacific and El Paso in 1957. They are undoubtedly even greater today although the District Court did not receive evidence on the point. President Boyd testified that Pacific participated in the development of the Dakota formation of the San Juan Basin. This formation underlies the reservoirs called Pictured Cliffs and Mesa Verde (R. 619). Although no reserves were attributed to Pacific's holdings in the Dakota in 1957, he testified that El Paso-Pacific added about 1,347 billion cubic feet of Dakota gas during 1963 and at

4. The decline in volume is due in part to a change in the method of measuring reserves but the percentages are comparable because the change applied to all reserves under discussion. (R. 1061)

the end of 1963 had approximately 4 trillion (4,000 billion) cubic feet of Dakota reserves. (R. 778-779) The 1962 El Paso-Pacific annual report described the acquisition by the company of reserves estimated at 780 billion cubic feet located in the Dakota formation as

> "• • • an important additional source of high pressure gaswell gas situated centrally in the company's existing San Juan Basin gathering system • • •"

which

> "• • • will be of particular value to the company in serving its existing customers. In addition to being in an area of production already connected to the Company's transmission system, such reserves are situated, in relation to the company's other sources of gas supply, nearest to the California market. Furthermore, the gas well nature of the reserves will represent an additional improvement of the ratio dry gas to residue gas in the company's gas supply." (Pl.'s Ex. 5, pp. 14, 15, R. 1720)

El Paso-Pacific proposes to turn over to Northwest domestic properties which as of January 1, 1964, were estimated to contain a total of 5,124 billion cubic feet of gas reserves. (Tab. 7, El Paso Proposal for Divestiture, Defs. Ex. A, R. 1865) The balance is made up of 2,469 billion cubic feet, of Canadian gas, or about the same amount Pacific had under contract in 1957 as reported in El Paso's prospectus. Assuming El Paso-Pacific acquired no net additional reserves after 1962, the division of total domestic reserves between El Paso and Northwest would be as follows:

	M²cf	
El Paso	30,476[5]	= 85.6%
Northwest	5,124	= 14.4%
	35,600	= 100.0%

5. El Paso's report did not break down their reserve total between dry gas and residue gas so these percentages are indicative only and not strictly comparable with the preceding percentages.

This unfair division of the El Paso-Pacific gas reserves is approved by the District Court's divestiture decree. The enormity of the reserves with which El Paso is making off and the arrogance with which the scheme has been put forward challenge credulity. None of the Dakota gas or other new gas acquired by El Paso-Pacific is allocated to Northwest under the divestiture plan. (R. 676-677, 952). As the Government stated in its brief filed January 6, 1965 (R. 1049-1076, 1063):

> "Prior to El Paso obtaining control of Pacific Northwest, the two companies were in fierce competition in the acquisition of gas acreage and gas purchase contracts in the San Juan Basin. It is unthinkable that this competitive effort would have ceased in the absence of the stock acquisition by El Paso. It is certain that Pacific Northwest with its plan to invade the California market would have been most aggressive in obtaining gas reserves in the San Juan Basin and elsewhere along its pipeline. The favorable cost of the San Juan Basin gas reserves as compared with Canadian reserves which are located much farther from the California market was and continues to be of vast importance. It cannot be fairly assumed the alert Pacific Northwest management would have sat on its hands and let El Paso gobble up all of the remaining uncommitted San Juan Basin reserves."

In the 1957 prospectus, Messrs. Brokaw, Dixon & McKee pointed out that once the reserves of Pacific in the San Juan area were acquired, El Paso would have a great deal of flexibility in drawing on those reserves to augment its supply from other areas. As stated by those experts:

> "The rate of production of residue gas depends directly upon the amount of oil produced. Oil production is prorated by the Railroad Commission of Texas and the New Mexico Oil Conservation Com-

mission according to the market demand. Therefore, as the market demand for oil fluctuates, the amount of casinghead gas available to the Company varies.

"The flow of gas from the dry gas wells can be varied within wide limits. The combined delivery capacity of the dry gas wells connected to your system in Lea County, New Mexico is approximately 2,300 million cubic feet per day. Daily variations in the supply of residue gas may be taken care of by controlling the flow of gas from these natural gas wells.

• • •

"The Company's underground gas storage facilities in Lea County, New Mexico, have a capacity of 17 billion cubic feet. A maximum of 88 million cubic feet of gas has been injected and 75 million cubic feet has been withdrawn in one day.

"The Company's facilities in the Permian Basin and San Juan area are connected by a large diameter pipeline and, although a large area is covered, the facilities are an integrated system so that it is practicable for one area to augment the gas supply of the other or to utilize excess gas from one area to supplement deliveries from the other.

By varying the amount of gas from the Lea County dry gas wells and utilizing the storage facilities and increasing or decreasing the amount taken from the San Juan Basin area, it is possible to make up deficiencies and use any surplus gas due to any foreseeable variation in the supply of residue gas." (Def. Ex. G, R. 1898, 1899)

Thus, even the inadequate record developed below discloses that El Paso, from 1957 through 1959 and El Paso-Pacific from 1960 through 1966 and continuing to this day has had the ability to vary within wide limits the amount of gas it draws from the San Juan Basin, including those properties which it intends to turn over to Northwest. What at the end of 1964 was estimated to be

17% of the reserves in the San Juan Basin may today, in 1966, in view of subsequent developments, be significantly less. It would not be surprising to find that El Paso-Pacific has been tending to draw its dry gas supplies from those wells which it expects to turn over to Northwest, thereby conserving the dry gas reserves in the Permian Basin and the other connected fields which it expects to retain as the property of El Paso. The lower court made no investigation of this possibility and the decree to be entered affords no protection to Northwest against this happening.

El Paso-Pacific's counsel was frank about the importance his client attached to retaining the gas reserve position in the San Juan which it achieved at the expense of Pacific.

> "Now, this attempt to get just a little more in the San Juan Basin is not just a little more, so far as El Paso is concerned. The reserves necessary to support the surface (sic) contracts and commitments of El Paso to its Southwest and California markets renders it essential that these after-acquired properties, acquired for the purpose of supporting those commitments be permitted to stand behind them. It was also in a large measure—and the Court will recall, because the Federal Power Commission had repeatedly told El Paso, 'you do not have adequate reserves,' that it acquired the stock of Pacific Northwest. And so in attempting to secure additional reserve to support its markets, El Paso has only been doing what is its legal and public duty to do." (R. 959)

The trouble with this argument, of course, is that it is putting the public service cart before the anti-trust horse. El Paso cannot justify retention of part of the fruits of violating the anti-trust laws by invoking subsequent regu-

latory approval of commitments based on the illegally acquired assets. *California v. Federal Power Commission*, 369 U.S. 482, 8 L.Ed.2d 54, 82 S. Ct. 901 (1962); See *Continental Insurance Co. v. United States*, 259 U.S. 156, 66 L.Ed. 871, 42 S. Ct. 540 (1922).

E. The District Court's Decree Facilitates and Approves, Without Any Anti-Trust Purpose, El Paso's Self-Serving Modification of Two Important Contracts Which Existed Between El Paso and Pacific

Certain contracts existed between Pacific and El Paso at the time of the stock acquisition and the merger. These contracts could not have been modified without the agreement of Pacific management. Although El Paso-Pacific gives lip service to the principle of restoring the *status quo ante*, in the case of two of these contracts it has turned the anti-trust proceedings below to the advantage of El Paso by getting the District Court to approve the reinstatement of these contracts with changes unilaterally designed by El Paso-Pacific. The contracts in question are the Kingsgate contract governing the disposition of imported Canadian gas as between the two companies and the San Juan gathering agreement by which the two companies agree to gather gas for each other in the San Juan Basin. The Government took the position that the changes proposed by El Paso-Pacific were not necessary for decision of the anti-trust implications of the case. (R. 996, 997) The processes of the District Court cannot be used to go beyond the anti-trust requirements of the case to penalize El Paso. *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 92 L.Ed. 1245, 68 S. Ct. 947 (1948). Neither should they be used to hand El Paso a bonus of relief from disadvantageous contracts. As the Government

maintained during the course of the hearings, the contracts should be reinstated as they existed prior to the acquisition and the burden should then be on El Paso to seek modification as it would have had to do had there been no acquisition. (R. 997)

F. The District Court's Decree Is Inconsistent and Weakens Northwest By Approving El Paso's Sale and Retention of the Proceeds of the Westcoast Transmission Stock

Consistent with its announced intention to give back what it got from Pacific, El Paso-Pacific's divestiture plan allocates capital stock in Phillips Pacific Chemical Company, Northwest Production Corporation and Pacific Northwest Realty Corporation to Northwest. (Defs. Ex. A, R. 1835-1918, 1842) Consistency disappears in the case of a substantial and readily marketable block of stock in Westcoast Transmission Ltd. formerly owned by Pacific. The decree provides that El Paso-Pacific will sell this to third persons and retain the proceeds instead of turning the stock over to Northwest. (R. 630) El Paso proposes to apply the proceeds to its general operations. (R. 665) It did not consult with the prospective management of Northwest to determine whether they would prefer some other plan of disposing of these shares. (R. 665-666) In the hands of Pacific, this stock constituted an advantageous link with an important supplier of Canadian gas and a liquid asset which had a value in January, 1965 of between seventeen and twenty million dollars. (R. 1070) Northwest is to be deprived of these advantages, to the further detriment of its capability as a potential competitor of El Paso.

G. The District Court's Decree Installs El Paso's Hand-Picked Management in a Position of Self-Perpetuating Control of Northwest

The by-laws of Northwest are drawn to provide that the initial Board of Directors shall hold office for four years from their selection and appointment. This makes it impossible to replace them except by their own choice. (Defs. Ex. T, R. 2153-2154, R. 2100) The first annual meeting of shareholders of Northwest cannot be held until April 1969 and special meetings cannot be held except at the call of the management, unless one-third of the outstanding stock of the corporation makes application for such a meeting. (Defs. Ex. T, R. 2153-2154) This effectively precludes the possibility for several years of a different management with plans for competing with El Paso being installed by a group of new shareholders of Northwest, even if a substantial block of shares were acquired by someone interested in ousting Northwest's management. That management has indicated that it is not familiar with Northwest's service area and has no present plans to compete with El Paso in California. (R. 2113, 2114) This attitude contrasts markedly with the aggressive attitude of Pacific's management before El Paso took control.

The foregoing does not purport to describe all the benefits El Paso will retain from violating the Clayton Act if the divestiture decree is not modified. For example, unless Northwest is allocated a fair share of the combined El Paso-Pacific properties and gas reserves, it will not receive its fair share of the saving in taxes achieved by El Paso-Pacific through the use of Pacific's tax losses. (See R. 1071-1075) Perhaps further proceedings in the District

Court would reveal other advantages El Paso will retain. Cascade submits that the minimum requirement of the law is that El Paso be deprived of those benefits which have been enumerated.

H. This Court Has Plenary Power to Modify the Decree of the District Court to Make It Conform to This Court's Mandate and the Anti-Trust Laws and Should Exercise That Power

In *Continental Insurance Co. v. United States*, 259 U.S. 156, 66 L.Ed. 871, 42 S. Ct. 540 (1922), the Government and the Reading Company agreed upon a decree which was then entered by the District Court to satisfy a mandate of the Supreme Court that the Reading Company be broken up. On appeal by intervenors representing common stockholders of the Reading Company, this court, on its own motion, modified the decree in several respects to assure the effective separation of the constituent companies and then remanded the case to the District Court to work out the details and make adjustments in the plan required by the modifications. In *United States v. DuPont De Nemours & Co.*, 336 U.S. 316, 325 n. 6, 6 L.Ed.2d 318, 81 S. Ct. 1243 (1961) this court observed that under the rule of *Continental Insurance*, no stipulation by the Government could circumscribe its power to see its mandate was carried out. This power to modify a consent decree was recognized by El Paso-Pacific's counsel in argument below. (R. 848-851, 1224-1226)

The provisions of the decree which preserve the jurisdiction of the Federal Power Commission do not mean that the Commission has the power to remedy the anti-

trust deficiencies of the decree. As stated by the Commission in the District Court, the Commission is bound to accept the District Court's determination as to the divestiture aspects of the case. (R. 77) Conversely, the actions of the Commission in issuing certificates approving additional service by El Paso-Pacific during the period of the combination cannot impede this court in the fashioning of a proper anti-trust divestiture decree. *California v. Federal Power Commission*, 369 U.S. 482, 8 L.Ed.2d 54, 82 S. Ct. 901 (1962).

The creditors of El Paso-Pacific cannot, by withholding their consent, prevent this court from making a proper division of El Paso-Pacific as required by the anti-trust laws. As stated by Government counsel, the chronology of the case shows that all of the stockholders, officers, directors and creditors of El Paso had actual notice of the divestiture suit years before the company merged with Pacific.

> "Necessarily they assumed the risk that there would be a divestiture, and they have no standing now that divestiture is required to plead that they are being penalized because they relied on the Government. Had they, in fact, relied upon the Government, this lawsuit could have been resolved years ago, your Honor, prior to the asset merger." (R. 865, 866)

Indeed, the anti-trust opinion in the El Paso prospectus for the exchange offering dated January 8, 1957, said that the question of whether or not the stock acquisition violated the anti-trust laws was not entirely free from doubt. (Defs. Ex. G, R. 1888) The situation is directly within the precedent of *Continental Insurance Co. v.*

United States, 259 U.S. 156, 171, 172, 66 L.Ed 871, 42 S. Ct. 540 (1922), where the court said:

> "The power of the court under the Sherman Anti-trust Law to disregard the letter and legal effect of the bonds and general mortgage under the circumstances of this case, in order to achieve the purpose of the law, we cannot question. . . ."

and

> "'One who takes a mortgage upon several items of property of such character that their common ownership or operation may offend against the Anti-trust Law or the commodities clause, and such that the mortgage serves practically to aid in tying them together, must be deemed to hold his mortgage subject to the contingency that if the complete and final separation of one item of the mortgaged property from the remainder becomes essential to the due enforcement of either named law, the court charged with such enforcement may take control of that item, free it from the consolidating tendency of the mortgage, and substitute therefor its judicially ascertained equivalent. . . .'"

Cascade suggests that divestiture will be expedited if work which has been done in the District Court and the Federal Power Commission can be utilized under a modified decree satisfying the requirements of anti-trust law, instead of vacating the decree.

Is there an adequate record upon which this court can design the necessary modifications of the decree or are further proceedings below required? Cascade submits that there is a sufficient record for this court to formulate modifications which will deprive El Paso of the fruits of its violation of the Clayton Act. Accordingly, it is proposed that this court modify the decree in the particulars hereafter specified to make it comply with the requirements of

anti-trust law, and then remand the matter to the District Court for such further proceedings as may be necessary within the guidelines of the modified decree. In view of the attitude of the District Court toward this case (R. 187[6], R. 976 [see page 18, *supra*]) it is imperative that such guidelines be as definite as possible.

I. Cascade's Proposals for Modification of the District Court Decree

1. Reallocation of gas reserves.

Allocation of gas reserves is the most difficult divestiture problem to deal with because of the nature of this asset. The reserves are located in many different places, but they are inter-connected so that for nine years El Paso-Pacific has possessed the ability to draw upon the reserves formerly owned by Pacific without limitation, while conserving its reserves in other fields where Pacific was not active. It even has the apparent capacity to draw gas out of the San Juan Basin and store it in underground storage facilities which are not the subject of divestiture. (Defs. Ex. G, R. 1898, 1899) There is the further complication that new reserves are continually being developed and acquired under a variety of contractual arrangements. Extending the familiar analogy, we are trying to unscramble the omelette while the chef stirs in more eggs and serves part of the omelette to his customers.

Cascade submits that the way the El Paso-Pacific reserves should be divided to prevent El Paso from retaining an advantage from its illegal acquisition of Pacific

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6. "Mr. Bennett: ***But for California this case would not be here today, your Honor.
"The Court: That might have been a good thing."

with its tremendous dry gas reserves, is on the basis of the *relative* reserve positions of El Paso and Pacific in May, 1957. Northwest should be vested with an undivided interest in all of the present domestic dry gas reserves of El Paso-Pacific in the same proportion that the domestic dry gas reserves of Pacific had to the combined domestic dry gas reserves of Pacific and El Paso in May of 1957.

The analyses on pages 21 to 23 of this brief show El Paso had 74.5% of the combined domestic dry gas reserves of El Paso and Pacific in 1957 and Pacific had 25.5%. Cascade suggests this court modify the District Court's divestiture decree to vest Northwest with a 25.5% undivided interest in each present domestic dry gas property or interest of El Paso-Pacific. The present allocation under the decree of residue gas sources and of Canadian supplies need not be disturbed.

The decree should further provide that allocation of specific dry gas properties and interests between Northwest and El Paso to sever the joint ownership of the dry gas properties or interests should then be accomplished within a specified period. This would be by arms-length trading between the two companies under District Court and Federal Power Commission supervision after Northwest's financing is completed and its management is in a position to carry on such negotiations on an equal basis with El Paso. If after such an allocation, El Paso is short of domestic dry gas, it will merely be back in the position where it was prior to the time it illegally acquired Pacific and the shoe will be pinching the proper foot.

Allocation to Northwest of Canadian gas to be pur-

chased under the Kingsgate and Sumas contracts, as proposed by El Paso-Pacific is proper, since the problem of compensating for suppression of competition for new gas reserves and the problem of fairly allocating the depletion of specific gas sources during the period of illegal combination as between properties destined for Northwest and properties destined for El Paso are not present in the case of the Canadian supplies. Furthermore, El Paso-Pacific has failed to demonstrate that these Canadian gas supplies are capable of being equated with domestic reserves to justify their being considered in the allocation ratios suggested by Cascade. The element of foreign control introduces the risk of future unilateral, adverse changes in supply and price over which no domestic regulatory or judicial body will have any authority. Indeed, the heavy dependency upon such foreign reserves presently dictated by the divestiture decree, itself tends to weaken the competitive position of Northwest. Northwest will not have the essential alternate source of supply which Pacific had, a supply which would provide it with a bargaining position in acquiring additional Canadian gas supplies and protection against prospective increases in the price of Canadian gas.

2. Reinstatement of Contracts Without Modification.

This court should order that the contractual arrangements which existed between El Paso and Pacific which El Paso-Pacific has suggested revising should be reinstated between El Paso and Northwest without change, subject to the right of El Paso and Northwest (after Northwest's management is functioning independently of El Paso), to modify said arrangements and seek regulatory approval of any such modifications.

3. Allocation of Westcoast Transmission Stock to Northwest.

The decree should be modified to provide that Northwest will receive and retain the Westcoast Transmission stock held by El Paso-Pacific.

4. Speed-Up of Divestiture of Northwest Stock.

The entire spin-off plan for making an exchange offering to El Paso-Pacific's shareholders and/or a public offering should be modified so that it will be accomplished much more rapidly. Such transactions are accomplished in relatively short periods of time in the usual course of corporate financing and the proposed three years after Northwest receives its Federal Power Commission certificate and receives its assets is too long. As a precedent, El Paso consummated an exchange of its shares for 99.8% of the publicly held shares of Pacific within seven months. *United States v. El Paso Natural Gas Company*, 376 U.S. 651, 655, 12 L.Ed.2d 12, 84 S. Ct. 1044 (1964). The distribution of at least 80% of the shares of Northwest's stock upon an exchange wth El Paso shareholders (R. 2020) should be accomplished in less time, and if not so accomplished, a sale of Northwest's stock to the public through underwriters (R. 2021) should not require more than an additional six months. In the alternative, the exchange offer to El Paso shareholders should be dispensed with in favor of a public or private sale of Northwest's stock to be accomplished within six months following transfer of the assets to Northwest, in the interest of expediting complete divestiture and termination of El Paso control. This court should also modify the decree to delete the provisions in the decree and in

the by-laws of Northwest which inhibit a change of management for four years.

J. Cascade Was Entitled to Intervene as a Matter of Right Under Rule 24(a) of the Federal Rules of Civil Procedure in Effect When Its Application for Intervention Was Denied By the District Court

As stated more fully to this court in Cascade's Brief in Opposition to the Motions of Appellees to Dismiss or Affirm, Cascade made a *prima facie* case for its right to intervene under former Rule 24(a)(3) of the Federal Rules of Civil Procedure. Moreover, the key point, the adverse effects on Cascade of the proposed decree's disposition of the properties in the custody of the court, was, in effect, admitted by El Paso-Pacific and the Justice Department in their stipulation for entry of the agreed divestiture decree. (R. 2024) In this respect and in the evidence it has submitted to the District Court, Cascade presents a unique case for intervention. This was recognized by the Solicitor General and the Justice Department in their Motion to Dismiss or Affirm filed August 29, 1966, in this court in *Pioneer National Title Insurance Company v. United States* (U.S. Sup. Ct., O.T., 1966, No. 402). (See footnote at page 12 of this brief.)

As stated in its Brief in Opposition, Cascade cites the abandonment by the Department of Justice of all pretensions to defending Cascade's interests, the lack of any other forum to which Cascade might have recourse to protect its interests affected by the decree, the Department's failure fully to defend the public interest and Cascade's inchoate claim in equity of an interest in the gas reserves in the custody of the court as supporting intervention

under former Rule 24(a)(2) of the Federal Rules of Civil Procedure. *Missouri-Kansas Pipeline v. United States*, 312 U.S. 502, 506, 85 L.Ed. 975, 61 S. Ct. 666 (1941); *Atlantic Refining Company v. Standard Oil Company*, 304 F.2d 387 (D.C. Cir., 1962); *Barnes v. Alexander*, 232 U.S. 117, 58 L.Ed. 530, 34 S. Ct. 276 (1914); *United States v. El Paso Natural Gas Company*, 376 U.S. 651, 12 L.Ed.2d 12, 84 S. Ct. 1044 (1964); *Tift v. Southern Ry. Co.* (C.C.S.D. Ga. 1908), 159 Fed. 555; *R. M. Smythe & Co. v. Chase National Bank*, 291 F.2d 721 (2d Cir. 1961).

K. Cascade Is Entitled to Intervene as a Matter of Right Under Rule 24(a)(2) of the Federal Rules of Civil Procedure as Amended Effective July 1, 1966.

Rule 24(a)(2) of the Federal Rules of Civil Procedure as amended effective July 1, 1966, provides:

> "Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

The order of the Supreme Court adopted February 28, 1966, amending Rule 24 among others, provided in part:

> "That the foregoing amendments and additions to the Rules of Civil Procedure shall take effect on July 1, 1966, and shall govern all proceedings and actions brought thereafter *and also in all further proceedings and actions then pending*, except to the extent that in the opinion of the court their application in a particular action then pending would not be feasible or

would work injustice, in which event the former procedure applies." (Emphasis supplied)

Cascade submits that it is entitled to intervene under this rule. Applying the rule at this stage in this case appears to be feasible and would not work injustice to any party. Obviously the El Paso-Pacific gas reserves are a subject of this action. Cascade's interest in the cost and availability of gas from its sole supplier in Washington and Oregon which was described in its Memorandum of Evidence, Law and Argument in Support of its Application for Leave to Intervene filed in the District Court on November 19, 1964 (R. 342-443) is directly related to these gas reserves and to the divestiture thereof.

At no time in these proceedings has the Department of Justice's representation of Cascade's interest been adequate. Their representative deprecated their ability to adequately represent the interests of New Company as natural gas experts more than once. They agreed with the suggestion of the District Court[7] that the New Company should be constituted as an adversary to El Paso-Pacific

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7. "THE COURT: I think that this notion of having a corporation set up before we have to decide some of the major questions in this lawsuit has some merit, and the merit, it [fol. 597-800] seems to me, it has is that we have *an adversary party here.*

"Of course, the United States, *in a sense,* is an adversary party, but, if we had a corporation going—let's call it 'New Company'—that had aggressive executive officers and management, board of directors, who had hired legal counsel to come in here and talk about what assets El Paso Natural Gas ought to transfer to that New Company under this divestiture, it seems to me that adversary position of the folks running the New Company and the folks running El Paso would go a long way to disabusing anybody's mind that El Paso was setting up a dummy here for doing anything at all contrary to the purpose and meaning of Section 7 of the Clayton Act or the decisions of the Supreme Court of the United States." (R. 1222-1223) (Emphasis supplied) • • •

"THE COURT: I don't want to issue the decree divesting the assets until we get the adversary party set up so that it can participate." (R. 1224)

before the important decisions in the case were made. (R. 1222) One time the Justice Department attorney trying the case said:

> "Now, the Antitrust Division, your Honor, has no intention of passing itself off as a group of natural gas experts." (R. 747)

and another time:

> "To the extent that the Justice Department is an adversary of El Paso in these proceedings, nevertheless we are not the same caliber or kind of adversary that could well represent New Company's interest, and, until some party is present before these proceedings to represent New Company's interests, we don't think it would be desirable to impose contracts or to renegotiate contracts in its behalf, . . ." (R. 1323)

At another stage of the proceedings they admitted their financial incapacity to have a proper critical study by experts made of the El Paso-Pacific reserve figures. (R. 906) These inadequacies extend to their representation of Cascade's interests derived through the New Company. If Cascade had believed that the New Company or the Department of Justice adequately represented its interests, it would very gladly have foregone the expense of seeking to intervene in these proceedings and of carrying this appeal to this court.

As demonstrated in its Brief of Opposition to the Motion to Dismiss or Affirm, Cascade is so situated that the disposition of the action may, as a practical matter, impair or impede its ability to protect its interest, within the meaning of amended Rule 24(a)(2). Once the extent and character of Northwest's reserves are finally decreed in these proceedings, the Federal Power Commission and other regulatory bodies will have no power to augment

Northwest's share of the El Paso-Pacific reserves. El Paso-Pacific has been careful to see that Northwest will have the minimum reserves sufficient to obtain a certificate from the Federal Power Commission. Mr. Boyd testified the fourteen year deliverability life of Northwest (a calculation which considers only that company's ability to meet its *present firm* obligations without curtailment) would meet the minimum test of the Federal Power Commission. (R. 151, 152) However, El Paso-Pacific made no allowance for growth in demand for gas after 1967, in the territory to be served by Northwest. (R. 154) The debt-equity ratio also meets minimum Federal Power Commission standards. (R. 693, 694, 1029) These proceedings are the only forum where Cascade can assert its right to not be harmed any more than is necessary by the establishment of Northwest and the re-establishment of El Paso out of the assets of El Paso-Pacific as required by the anti-trust laws. Therefore, it has a right, under amended Rule 24(a)(2) to intervene.

CONCLUSION

The District Court erred in denying Cascade leave to intervene and in accepting and entering the stipulated decree of divestiture when it obviously does not comply with this court's mandate and does not relieve El Paso of the fruits of its violation of the Clayton Act.

Cascade submits that the errors below will be substantially cured if this court modifies the decree as suggested by Cascade and orders that Cascade be given leave to intervene for the purpose of such further proceedings in the District Court as are necessary to implement the modi-

fied decree. See *Mathieson v. Craven* (D. Del. 1917), 247 Fed. 223, 228.

Alternatively, this court should vacate the decree of divestiture entered by the District Court, and the orders of the District Court entered pursuant thereto, cancel and nullify the stipulation for the entry thereof, grant Cascade leave to intervene and remand the case to the District Court for compliance with this court's judgment herein of April 6, 1964. (R. 1)

Respectfully submitted,

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